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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. BEN TAYLOR, Defendant and Appellant.	2d Crim. No. B206149 (Super. Ct. No. BA312046-02) (Los Angeles County)

Ben Taylor appeals from the judgment following his conviction by jury of possession for sale of heroin. (Health & Saf. Code, § 11351.)[1] Appellant's codefendant Ricky Dolberry was also convicted of possession for sale of heroin; he is not a party to this appeal. The prosecution also charged appellant and Dolberry in single, separate counts with selling heroin. (§ 11352, subd. (a)(2).) The court declared a mistrial as to the sales of heroin counts after the jury deadlocked on them. Appellant challenges the sufficiency of the evidence and contends that the court committed instructional errors. We affirm.

[1] All statutory references are to the Health and Safety Code.

BACKGROUND

Prosecution Case in Chief

People sell and use illegal narcotics in the area surrounding 49th Street and Avalon Boulevard in Los Angeles. On November 4, 2006, at about 8:00 a.m., Los Angeles Police Department Detective Erik Armstrong of the Newton division narcotics detail parked his unmarked car on the south side of 49th Street to monitor the area.

Armstrong saw appellant and Ricky Dolberry standing on the sidewalk on the northeast corner of 49th Street and Avalon. A woman approached at about 8:15 a.m. and spoke with them briefly. She gave appellant paper currency which he put in his left back pocket. Dolberry then removed a pill bottle from his right pocket, opened it, removed a small yellow and black item, and handed it to the woman.

A minute or two later, a man parked a Nissan Sentra on 49th Street, got out, and approached appellant and Dolberry. After speaking with them briefly, he handed paper currency to appellant. Appellant put the money in his left rear pocket. Dolberry then removed a pill bottle from his right pocket, opened it, retrieved a small yellow and black item, and handed it to the man.

Armstrong summoned Officers Michael Mitchell and Eric Spear and they approached appellant and Dolberry. Dolberry dropped a pill bottle on the sidewalk. The bottle bore Dolberry's name and contained three bindles of black tar heroin wrapped in yellow cellophane. The combined weight of the three bindles was 0.16 grams.

Officers recovered $190 in cash from appellant's left rear pocket, including eight $20 bills and six $5 bills. They later recovered an additional $2,050 from his wallet, consisting of 12 $100 bills, three $50 bills, and 35 $20 bills. The street price of each recovered heroin bindle was approximately $10. The $5, $10 and $20 bills recovered from appellant are typical of those used to buy narcotics on the street.

Narcotics sellers often operate in pairs with one seller handling the money and the other handling the narcotics. If one seller is a robbery victim, the team will not lose the narcotics and their money. In addition, if the seller who carries the narcotics is arrested without carrying an excessive amount of currency, he may claim that he possessed the narcotics for his own use rather than for sale.

Armstrong opined that appellant and Dolberry possessed the heroin for sale based on the following facts: They worked together in two "hand-to-hand" narcotics transactions with buyers who exchanged money for small amounts of narcotics; they did so in an area known for a high level of narcotics activity; police recovered heroin from the pill bottle that Dolberry threw on the sidewalk; appellant carried currency of the type used to sell narcotics on the street, including 43 $20 bills and six $5 bills; and neither appellant nor Dolberry possessed any drug paraphernalia.

Defense Case

Donald Spry testified that appellant drove him to the methadone clinic at 49th Street and Avalon on November 4, 2006, at about 7:35 or 7:40 a.m., where Spry was selling bags of nuts. Spry saw Dolberry there, but he never saw Dolberry give anyone anything. Spry did not see anyone give appellant any money either. When police officers arrived at the scene, they detained Spry and a woman named Shirley. Spry was convicted of grand theft in 1990.

Reginald Washington testified that he saw his friend Dolberry with appellant near the 49th Street and Avalon methadone clinic on November 4, 2006. Washington arrived there at approximately 7:50 a.m. and spoke with Dolberry for 20 or 25 minutes. Washington never saw Dolberry with a pill bottle, and he did not see anyone approach Dolberry to purchase drugs. Washington entered the clinic when it opened. When he left the clinic, the police were detaining Dolberry, appellant and Spry. Washington had several prior convictions, including two 1983 bank robberies and a 1997 gun offense.

Prosecution Rebuttal

Police did not detain Spry or any woman named Shirley during the November 4, 2006, incident at 49th Street and Avalon.

DISCUSSION

Substantial Evidence Supports the Possession of Heroin for Sale Conviction

Appellant challenges the sufficiency of the evidence to support his conviction of possession of heroin for sale. In reviewing an insufficient evidence claim, we consider the entire record in the light most favorable to the judgment to determine whether it discloses substantial evidence such that a reasonable jury could find the defendant guilty beyond a reasonable doubt. (*People v. Elliot* (2005) 37 Cal.4th 453, 466.) We presume the existence of every fact supporting the judgment. (*People v. Crittenden* (1994) 9 Cal.4th 83, 139.) A judgment will be reversed only if there is no substantial evidence to support the verdict under any hypothesis. (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.) This standard of review also applies to prosecutions resting upon circumstantial evidence. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1129.)

In order "[t]o support a conviction of possession of [heroin] for sale, it must be shown that the appellant exercised control or had the right to exercise control over the controlled substance, that he had knowledge of the presence of the controlled substance, that he had knowledge of its nature, and that he had the specific intent to sell the same." (*People v. Glass* (1975) 44 Cal.App.3d 772, 774.) Here, appellant argues that there is no evidence that he knew that Dolberry's pill bottle contained heroin. He further argues that even if there were evidence that he had such knowledge, there was no evidence that he exercised any control over, or had the right to control, the heroin. In so arguing, appellant stresses that the jury failed to convict him or Dolberry of selling heroin. Their failure to reach verdicts on the sales counts "has no bearing on" our evaluation of the sufficiency of the evidence to support the possession for sale of heroin count. (See *People v. Pahl* (1991) 226 Cal.App.3d 1651,

1657.) We review the sufficiency of the evidence for a crime "'independent of the jury's determination [of the] evidence on another count . . . .'" (*People v. Lewis* (2001) 25 Cal.4th 610, 656.)

"[E]xperienced officers may give their opinion that . . . narcotics are held for purposes of sale based upon such matters as the quantity, packaging and normal use of an individual; on the basis of such testimony convictions of possession for purpose of sale have been upheld." (*People v. Newman* (1971) 5 Cal.3d 48, 53, overruled on other grounds in *People v. Daniels* (1975) 14 Cal.3d 857, 862.) Armstrong, an experienced officer, opined that appellant and Dolberry possessed the heroin with the intention to sell it. Appellant and Dolberry acted in tandem, as often happens with narcotics sellers, with one individual controlling the money and the other controlling the narcotics. They operated in an area known for its high volume of narcotics sales. The bottle dropped by Dolberry contained heroin packaged in amounts typically sold for individual use, and appellant possessed currency in denominations typically associated with street narcotics sales. Notably, each buyer gave appellant money before Dolberry removed the pill bottle and handed the buyer heroin. This evidence supports the inference that appellant exercised dominion and control over the heroin with Dolberry and knew that it was heroin. Substantial evidence supports the possession of heroin for sale conviction.

Jury Instructions

Appellant also contends that the trial court erred by instructing jurors with CALCRIM Nos. 223 and 302, which together "undermined the presumption of innocence . . . and improperly shifted the burden of proof to him," and thereby deprived him of due process. We disagree.

As given by the trial court, CALCRIM No. 223 read:

"Facts may be proved by direct or circumstantial evidence or by a combination of both. Direct evidence can prove a fact by itself. For example, if a witness testifies he saw it raining outside before he came into the courthouse, that

testimony is direct evidence that it was raining. Circumstantial evidence also may be called indirect evidence. Circumstantial evidence does not directly prove the fact to be decided, but is evidence of another fact or group of facts from which you may conclude the truth of the fact in question. For example, if a witness testifies that he saw someone come inside wearing a raincoat covered with drops of water, that testimony is circumstantial evidence because it may support a conclusion that it was raining outside. [¶] Both direct evidence and circumstantial evidence are acceptable types of evidence to prove or disprove the elements of the charge, including intent and mental state and acts necessary to a conviction, and neither is necessarily more reliable than the other. Neither is entitled to any greater weight than the other. You must decide whether a fact in issue has been proved based on all of the evidence."

Appellant argues that by stating that the purpose of evidence is to "prove *or disprove* the elements of a charge," CALCRIM No. 223 suggests that the defense must do more than merely raise a reasonable doubt in order to merit an acquittal, and that the defense must disprove an element of the charged offense. This argument ignores the language of CALCRIM No. 223 which neither refers to the burden of proof nor states that a defendant must affirmatively disprove an element of the offense in order to obtain an acquittal. "Reasonably read, [CALCRIM No. 223] cautions only that neither direct nor circumstantial evidence should be accorded greater weight simply because it is direct or circumstantial evidence." (*People v. Anderson* (2007) 152 Cal.App.4th 919, 930.)

"In assessing defendant's claim of error, we consider the entire charge to the jury and not simply the asserted deficiencies in the challenged instruction. [Citation.] [A] charge is not erroneous or prejudicial simply because a required explanation is given in two instructions rather than one." (*People v. Lewis, supra*, 25 Cal.4th 610, 649.) The jury below was instructed with CALCRIM No. 200 to consider all of the instructions together. It also was instructed with CALCRIM No. 220 that the defendant was entitled to an acquittal unless the evidence proved their guilt beyond a

reasonable doubt, and with CALCRIM Nos. 2300 and 2302 that the prosecution was required to prove the elements of the charged offenses in order to prove the guilt of the defendant. When considered with the court's other instructions, CALCRIM No. 223 does not undermine the presumption of innocence, shift the burden of proof, or suggest that the defense must disprove an element of the charged offense.

The court also instructed the jury with CALCRIM No. 302 as follows:

"If you determine there is a conflict in the evidence, you must decide what evidence, if any, to believe. Do not simply count the number of witnesses who agree or disagree on a point and accept the testimony of the greater number of witnesses. On the other hand, do not disregard the testimony of the greater number of witnesses, or any witness, without a reason or because of prejudice or a desire to favor one side or the other. What is important is whether the testimony or any other evidence convinces you, not just the number of witnesses who testify about a certain point."

Appellant attacks the portion of CALCRIM No. 302 which tells jurors that in resolving a conflict in the evidence, they "*must decide what evidence, if any, to believe*." (Italics added.) Stressing that CALCRIM No. 302 does not distinguish between inculpatory and exculpatory evidence, appellant contends that it undermines the presumption of innocence and imposes on the defendant the burden of pointing to exculpatory evidence to raise a reasonable doubt.

Reading CALCRIM No. 302 reasonably, and in context, we reject appellant's contention. Nothing in the instruction undermines the presumption of innocence or obligates a defendant to present exculpatory evidence. CALCRIM No. 302 could not mean that, particularly when considered alongside the standard burden of proof instruction, CALCRIM No. 220, which was given here. Further, when CALCRIM No. 302 is considered in conjunction with CALCRIM No. 226, which was also given here, the effect is simply to tell jurors that they can disbelieve witnesses. CALCRIM No. 302 "does *not* tell the jury to disregard the prosecution's burden of

proof or to decide the case on the basis of disbelief of defense witnesses or presentation of more compelling evidence by the prosecution than by the defense." (*People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1191.) It simply "mandates that the jury 'decide what evidence, *if any*, to believe,' regardless of which side introduces the evidence." (*Ibid*.)

The judgment is affirmed.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Luis A. Lavin, Judge

Superior Court County of Los Angeles

Richard L. Fitzer, under appointment by the Court of Appeal, for Defendant and Appellant.

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